No. 20306

In the

United States Court of Appeals

For the Ninth Circuit

NEAL CLARK,

Appellant,

vs.

STATE OF WASHINGTON, and WASHINGTON STATE BAR ASSOCIATION, an agency of State government,

Appellees.

THE STATE BAR OF CALIFORNIA,

Amicus Curiae.

Brief of Amicus Curiae

On Appeal from the United States District Court for the Western District of Washington, Northern Division

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I.

JURISDICTION

Appellant contends that the District Court's jurisdiction was sustained by two Civil Rights Act, 42 U.S.C.A. § 1983 and 28 U.S.C.A. § 1343 (3) (O. Br. 1-2).*

*Appellant's opening brief will be referred to as "O. Br."
Appellant also claims that jurisdiction was "vested in the Federal Courts by virtue of their unquestioned inherent right of control of their attorney officers . . ." (O. Br. 2). *Theard v. United States,* 354 U.S. 278, 77 S.Ct. 1274 (1957) (O. Br. 7). Federal courts do have the power to "control" the attorneys who practice before them, but that does not mean they have the power to control those attorneys with respect to their practice before state courts. In fact, both state and federal courts have "autonomous" control over the attorneys who practice before them. *Theard v. United States, supra.* See pp. 12-13, *infra.*

There is some question whether the District Court lacked jurisdiction entirely, or whether it had jurisdiction to decide that the complaint did not state a cause of action. See *Bell v. Hood,* 327 U.S. 678 (1946); *Harvey v. Sadler,* 331 F.2d. 387 (9th Cir. 1964). Since the complaint plainly did not state a cause of action, the question of jurisdiction need not be decided. The District Court's judgment must be affirmed in either event.

Jurisdiction in this Court to review the District Court's judgment is sustained by 28 U.S.C.A. §§ 1291 and 1294, which give each court of appeals jurisdiction of appeals from judgments of district courts situated within its circuit.

II.

STATEMENT OF THE CASE

In March, 1961, the Washington State Bar Association ("Washington State Bar") served appellant with a disciplinary complaint. The complaint contained three counts. (*In re Clark,* 61 W.2d 547, 379 P.2d 354 (1963), *cert. den.,* 375 U.S. 986 (1964), Tr. 19).* The first charged that appellant had secured a deed to property from a 95 year old, mentally ill lady upon a promise to support her for life, and that he did not keep his promise. The day after obtaining the deed he petitioned a court to appoint a guardian for the lady, alleging in the petition that she was incompetent. (61 W.2d at 548-50; Tr. 19-20)

The second count charged that appellant obtained public support for the lady by concealing his promise to support her from a county Department of Public Assistance (61 W.2d at 551; Tr. 20).

The third count charged that appellant conspired to extort funds from a former client by falsely accusing him of an extra-marital affair (61 F.2d at 551-52; Tr. 20-21).

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*The Clerk's transcript of record will be referred to as "Tr."

According to Washington law, hearings upon disciplinary complaints are held before a trial committee created by the Board of Governors of the Bar. Washington Rules of Court, Rules for Discipline of Attorneys, 5, 7, Tr. 38-9, 42-45 ("Rules Disc."). After the committee hears a matter, it makes findings and conclusions concerning it, and submits them, together with the record made before it and its recommendation as to discipline, to the Board of Governors (Rules Disc., 5, 8, Tr. 38-9, 45-47). Upon reviewing the record and recommendation, the Board makes its own findings and recommendation. If the recommendation is disbarment, as it was in this case, the record must be filed with the State Supreme Court (Rules Disc., 8 D, Tr. 47). After the matter is briefed, it is heard by the Court (Rules Disc., 9, Tr. 47-8). The power to disbar is "exclusively" in the Court, and the Board of Governors' recommendation as to discipline is "advisory only". *In re Simmons,* 59 W.2d 689, 369 P.2d 947, 956 (1962); *Matter of Ballou,* 48 W.2d 539, 295 P.2d 316, 318 (1956).

That procedure was followed in this case (O. Br. 3; Comp., Para. V, Tr. 2). A trial committee heard the case and found that all three counts of the disciplinary complaint were sustained. The Board of Governors reviewed that finding, and found that the first two counts were sustained, but that the third was not. It recommended disbarment. The Washington Supreme Court heard the matter, found that the same two charges were sustained, and entered judgment disbarring appellant. (O. Br. 3; Comp., Para. V, Tr. 2; *In re Clark, supra,* Tr. 18-22).

Subsequently, appellant petitioned the Supreme Court of the United States for certiorari, which was denied (Comp., Para. III, Tr. 1). Some ten months later, he filed this action.

It alleges that the proceedings leading to his disbarment were not "fair and impartial" (Comp., Para VIII, Tr. 5)* because the trial committee and the Board of Governors allegedly (1) did not hear two witnesses whom appellant thought they should have heard (Comp., Paras. V, VI, Tr. 3-4); (2) received evidence that he thought they should not have received (Comp., Para. VIII (1), (3), (4), Tr. 5-6); (3) conducted the hearing too long a time, and asked too many questions, "thereby rendering plaintiff's own counsel nearly mute" (Comp., Para. VIII (7);† (4) made an erroneous finding of fact (Comp., Para. VIII (5), Tr. 6; and (5) failed to follow some state procedural rules (Comp., Paras. VII, VIII (2), (6), (8), Tr. 4-7).

The action is brought under a Civil Rights Act enacted during Reconstruction (Comp., Para. I; O. Br. 1), and its theory apparently is that appellant was disbarred without "procedural due process" (O. Br. 5-7). It prays for a federal court injunction reinstating him to practice before the

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*It also claims he was "subjected to cruel and unusual punishment." (O. Br. 6, 16). Of course defrauding both a 95 year old incompetent lady and a public agency, which the Washington Supreme Court found appellant to have done, involves moral turpitude, see e.g., *In re Clark, supra*, at 552; *In re Hallinan*, 43 Cal. 2d 243, 247-48, 272 P.2d 768 (1954), and cases cited in it. It is an ancient practice to disbar an attorney for committing acts involving moral turpitude, see e.g., *Ex Parte Wall*, 107 U.S. 265 (1882) (Cited at O. Br. 9); *Saier v. State Bar of Michigan*, 293 F.2d 756, 760, *cert. den.*, 368 U.S. 947 (1961). The claim that that practice is cruel and unusual is frivolous.

†According to appellant's calculations, his counsel asked 1,820 questions and the trial "committee's side" asked 2,995 (Tr. 54). At appellant's counsel's request (Transcript of Hearing Before Trial Committee, filed in District Court on May 17, 1965, Tab B, p. 34, lines 22-24), appellant made an opening statement to the trial committee which fills 28 pages of transcript (Tab B, pp. 36-64). The "Association's" Opening Statement fills 8 pages (Tab B, pp. 28-34).

courts of the State of Washington.* The District Court dismissed the complaint upon appellees' motions to dismiss under Rule 12, and this appeal followed (Tr. 77-82).

The disciplinary procedure provided by Washington law —hearing before a trial committee, review by the Board of Governors of the Bar, subsequent review by a State Supreme Court having exclusive power to impose discipline— is similar to that of many other states, see 114 A.L.R. 161, 168-72, including California. See California Bus. & Pro. Code § § 6078-84, 6086.5; Rules of Procedure of Cal. State Bar, 34, 36, 38, 40. Because of that similarity and because this case questions the traditional authority of state bars and supreme courts to discipline attorneys in accordance with those procedures, The State Bar of California ("Cali-

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*The complaint also prayed for damages, but appellant has dropped that claim (O. Br. 8). In any event, it clearly could not have been maintained. In conducting disciplinary proceedings the Washington State Bar acts as an "intermediary agent" of the Washington Supreme Court. *In re Simmons,* 59 W.2d 689, 369 P.2d 947, 954 (1962); *In re Bruen,* 102 Wash. 472, 172 Pac. 1152 (1918). Cf. *Chronicle Publishing Co. v. Superior Court,* 54 Cal. 2d 548, 354 P.2d 637 (1960). Since it acted as that court's agent in conducting the disbarment proceedings of which appellant complains, it has judicial, or quasi-judicial, immunity from an action for damages arising out of its conduct of those proceedings, including one brought under the Civil Rights Acts, and alleging that the proceedings deprived appellant of due process of law. *Duzynski v. Nosal,* 324 F.2d 924 (7th Cir. 1963); *Bartlett v. Weimer,* 268 F.2d 860, 872 (7th Cir. 1959), *cert. den.,* 361 U.S. 938 (1959); *Byrne v. Kysar,* 347 F.2d 734 (7th Cir. 1965); *Harvey v. Sadler,* 331 F.2d 387 (9th Cir. 1964); *Larsen v. Gibson,* 267 F.2d 386 (9th Cir. 1959), *cert. den.,* 361 U.S. 848 (1959); *Agnew v. Moody,* 330 F.2d 868 (9th Cir. 1964), *cert. den.,* 379 U.S. 867 (1965); *Harmon v. Superior Court,* 329 F.2d 154 (9th Cir. 1965); *Sires v. Cole,* 320 F.2d 877 (9th Cir. 1963); *Cawley v. Warren,* 216 F.2d 74 (7th Cir. 1954); *Lyons v. Baker,* 180 F.2d 893 (5th Cir. 1950), *cert. den.,* 340 U.S. 828 (1950); *Rhodes v. Meyer,* 334 F.2d 709 (8th Cir. 1964), *cert. den.,* 379 U.S. 915 (1965); *Pierson v. Ray,* 352 F.2d 213 (5th Cir. 1965).

Furthermore, appellant's action for damages could not have been maintained for some of the same reasons that the suit for injunction could not. See pp. 8, 14-15, *infra.*

fornia State Bar") has requested the parties to consent to its filing an amicus curiae brief in this Court, and they have kindly done so.* As amicus curiae, the California State Bar takes no position with respect to whether the fact findings of the trial committee in this case, or the decision of the Washington Supreme Court, were correct. Its position is that those proceedings cannot be attacked in this proceeding.

Federal district courts are not reviewing courts having power to reverse the judgments of state supreme courts imposing discipline upon the attorneys practicing before them. The California State Bar is concerned that, should this Court reverse the District Court's decision and permit it to entertain this action, this Court will have clothed district courts with just that power, and as a consequence will have seriously impaired the orderly process by which state courts traditionally discipline their officers.

III.

ARGUMENT

Summary of Argument

This action constitutes a collateral attack upon a final state court judgment of disbarment and therefore cannot be maintained (Part III A, *infra.*)

The statutes under which the action is brought, 42 U.S.C.A. § 1983 and 28 U.S.C.A. § 1343 (3) are applicable only to "persons," and neither the State nor the State Bar, which is a governmental agency of the State, is a person within the meaning of those statutes (Part III B, *infra.*)

Neither this Court nor the District Court could grant an injunction compelling appellees to admit appellant to practice or not to disbar him, which is the relief for which

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*The consents are attached to the Notice of Appearance, filed on January 12, 1966.

appellant prays. The reason is that the Supreme Court of the State of Washington is the only body having the power to admit or disbar an attorney, and it is not before this Court (Part III C, *infra.*)

A. This Is a Collateral Attack Upon a State Court Judgment, and Therefore Cannot Be Maintained.

On February 29, 1963, the Supreme Court of Washington entered its order disbarring appellant. Appellant petitioned the Supreme Court of the United States for a writ of certiorari to review that judgment, but the petition was denied (Comp., Para. III, Tr. 1). Some months later, he filed this action. It prays for an injunction "requiring defendants to restore plaintiff to the list of active members of the Washington State Bar Association", and "vacating the Judgment of disbarment." (Comp., Prayer, Tr. 8).* As such, it is "merely a collateral attack" upon that judgment, and cannot be maintained. *Pena v. Hammond,* 172 F.2d 312 (5th Cir. 1949); *Grubb v. P.U.C.,* 281 U.S. 470 (1930).

A state court judgment is entitled to full faith and credit, and cannot be collaterally attacked, in a federal court. 28 U.S.C.A. § 1738; *Rooker v. Fidelity Trust,* 263 U.S. 413 (1923); *Grubb v. P.U.C.,* 281 U.S. 470 (1930); *Boundary County, Idaho v. Woldson,* 144 F.2d 17 (9th Cir. 1944), *cert. den.,* 324 U.S. 843 (1944); *Chirillo v. Lehman,* 38 F. Supp. 65, 67, (S.D. N.Y. 1940), *aff'd per curiam,* 312 U.S. 662 (1940):

> "The principle is established beyond contradiction that a judgment of a state court may not be reviewed by a bill of equity in a federal court."

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*The prayer asks, "in the alternative, that defendants proceeding be set aside." That alternative prayer is identical in substance to the prayer for an injunction "vacating the Jugment of disbarment."

That is true whether the grounds upon which the judgment is attacked were presented to the state court, as appellant's contentions apparently were in this case,* or whether they were not. *Grubb v. P.U.C.,* 281 U.S. 470 (1930); *Lehigh Valley Ry. Co. v. Martin,* 100 F.2d 139 (3rd Cir. 1938), *cert. den.,* 306 U.S. 651 (1938); *Hobbs v. Franklin Jewelry Co.,* 131 F.2d 432 (5th Cir. 1942).

It is also true where the ground upon which the state court judgment is attacked is, as in this case, that appellant was deprived of a hearing or of due process in the state proceedings. (Comp., Para. VIII, Tr. 5-7). *Hicks v. Los Angeles,* 240 F.2d 495 (9th Cir. 1957) (plaintiff complained state proceedings denied him a hearing); *Glasser v. Wessel,* 152 F.2d 428 (2nd Cir. 1945), *cert. den.,* 328 U.S. 839 (1945) (plaintiff complained state court's failure to grant continuance deprived him of due process); *Williams v. Tooke,* 108 F.2d 758 (5th Cir. 1940), *cert. den.,* 311 U.S. 655 (1940); *Drawdy Investment Co. v. Leonard,* 261 F.2d 226 (5th Cir. 1958). "Due process does not give parties the right to litigate the same question twice." *Wayside Transp. Co. v. Marcell's Motor Express, Inc.,* 284 F.2d 868, 871 (1st Cir. 1960).†

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*There was a dissenting opinion in the State Supreme Court which appellant asserts to be "clear in holding that a fair and impartial trial was not received." (Comp., Para. VIII, Tr. 5). His brief refers to the "constitutional questions *alleged* in the State proceeding of disbarment." (Emphasis added) (O. Br. 14). Further, he petitioned for certiorari, presumably on the theory that the proceedings and the judgment presented a federal question. Evidently, therefore, his contention that the "trial" was unfair was before the Washington Supreme Court, and was presented in his petition for certiorari.

†The rule forbidding collateral attack is equally applicable to the damage claim which appellant has dropped. The reason is that an action for damages against a state agent, like the State Bar, whose efforts persuade a court, like the Washington Supreme Court, to enter judgment against plaintiff, or to convict him, in a prior case, necessarily entails a collateral attack upon that judgment or conviction. Prosser, *Torts,* pp. 856-67; *Caraker v. Webster,* 24

Appellant seems to argue, however, that the rule forbidding collateral attacks is not applicable to his case because (1) the disbarment proceedings were a "sham" and a "nullity," (O. Br. 9, 13) and (2) because federal courts have "inherent power and jurisdiction in the control of attorneys" admitted to practice before federal courts (O. Br. 7-8). Both those arguments are erroneous.*

1. THE JUDGMENT CANNOT BE ATTACKED ON THE GROUND THAT THE DISBARMENT PROCEEDINGS WERE A SHAM OR NULLITY.

Appellant says that the disbarment proceedings were a "sham" and a "nullity" "as defined" in *Sarelas v. Sheeham,* 326 F.2d 490 (7th Cir. 1963), *cert. den.,* 377 U.S. 932 (1964) (O. Br. 9, 13).

Sarelas held that a complaint charging a court appointed officer with having committed "errors and irregularities" in state court proceedings did not state a cause of action under the Civil Rights Acts. It also said that the situation is different "when the proceeding itself is a sham or nullity" and is conducted "with a purpose to deprive a person of property without due process of law." *Id.* at 491. It did not say what a "sham" or "nullity" is.

C.A.2d 300, 301, 74 P.2d 1048 (1938) (action for damages against officers whose charges resulted in Civil Service Commission's order discharging plaintiff civil servant); *Andrews v. Young,* 21 C.A.2d 523, 69 P.2d 891 (1937); *Wolcott v. Hutchins,* 245 F. Supp. 578 (S.D.N.Y. 1965). Cf. I Freeman, *Judgments,* p. 629 (5th Ed. 1925).

*Appellant also points out that "consideration of Federal constitutional rights in state proceedings is now mandatory," citing *Young v. Ragen,* 337 U.S. 235 (1949) (O. Br. 11). That is true, but it does not follow that a federal district court can entertain a collateral attack upon a final state court judgment based upon the theory that the proceedings leading to judgment deprived the plaintiff of procedural due process. It is in fact clear that a collateral attack cannot be maintained on that theory. See *Hicks v. Los Angeles,* 240 F.2d 495, 497 (9th Cir. 1957); cases cited at p. 8, *supra.*

Appellant does not allege that the disbarment proceedings were conducted "with a purpose to deprive . . . [him] of property without due process of law," and therefore one half of what *Sarelas* requires to make a "different situation" is missing. The other half is also missing; the improprieties appellant alleges took place in the proceedings were clearly mere "errors and irregularities," and did not convert those proceedings into a "sham" or "nullity," whatever those terms may mean.

The alleged improprieties are that the trial committee or the Board of Governors (1) excluded evidence they should have admitted; (2) admitted evidence they should have excluded; (3) conducted the hearing too long a time and thereby prevented appellant's counsel from asking everything he wanted to ask*; (4) made an erroneous finding of fact; and (5) failed to follow some state procedural rules. See p. 4, *supra.* Erroneous rulings as to the admission or exclusion of evidence, *Stafford v. Superior Court,* 272 F.2d 407, 409 (9th Cir. 1959), *cert. den.,* 362 U.S. 979 (1960); *Gately v. Sutton,* 310 F.2d 107 (1962); improper limitation upon counsel's interrogation, *Stafford v. Superior Court, supra;* the making of erroneous fact findings, *Lynch v. Bernal,* 9 Wall. 315 (1869); *Hodge v. Huff,* 140 F.2d 686 (D.C. Cir. 1944), *cert. den.,* 322 U.S. 733 (1944); *Manson v. Duncanson,* 166 U.S. 533, 545 (1897); and the failure to follow state procedural rules, *Santiago v. Nogueras,* 214 U.S. 260 (1909); *Fishel v. Kite,* 101 F.2d 685 (D.C. Cir. 1938), *cert. den.,* 306 U.S. 656 (1939), all are merely "errors and irregularities," and do not subject a judgment to collateral attack.† It makes no difference that

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*According to appellant's calculation, his "side" asked 1,820 questions and the committee's asked 2,995 (Tr. 54). See p. 4, *supra.*

†It has been the rule "from time immemorial", and *Sarelas* merely restated it, that a judgment cannot be collaterally attacked for mere "errors and irregularities" in the proceedings leading to

the attack is based upon the Civil Rights Acts, *Stafford v. Superior Court, supra, Gately v. Sutton, supra, Sarelas v. Sheeham, supra,* or that the alleged errors amount to deprivation of procedural due process. See cases cited at p. 8 *supra.* See also *Stafford v. Superior Court, supra.*

Moreover, the Washington Supreme Court entered the judgment which disbarred appellant, not the Board of Governors or the trial committee, neither of which had the power to do so. See p. 3 *supra.* Appellant does not allege or claim that the Supreme Court's proceedings were a "sham" or a "nullity." Since he does not, and since it is that court's judgment which stands as a bar to this collateral attack, it is immaterial whether or not the proceedings in the committee or the Board were a "sham" or a "nullity." See *Saier v. State Bar of Michigan, supra,* 293 F.2d at 760. Cf. *Angel v. Bullington,* 330 U.S. 183 (1947); *Duncan v. Gegan,* 101 U.S. 810 (1879); *Ensher v. Ensher,* 238 A.C.A. 297, 47 Cal. Rep. 688 (1965).*

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it. *Iselin v. La Coste,* 147 F.2d 791 (5th Cir.), *cert. den.,* 321 U.S. 790 (1944); *Chandler v. Peketz,* 297 U.S. 609, 612 (1936); *Marchand v. Frellsen,* 105 U.S. 423, 428-9 (1881); I Freeman, *Judgments,* pp. 772-3 (5th Ed. 1925).

*Appellant asks this Court in effect to order the Supreme Court of Washington to change its judgment. See p. 7, *supra,* p. 16, *infra.* A rule complementary to the rule prohibiting collateral attacks also prohibits this Court, or the District Court, from granting that relief. The power to admit or to disbar is a discretionary, in fact a judicial, power. *Ex Parte Garland,* 71 U.S. (4 Wall.) 333, 378-9 (1866) (cited at O. Br. 16); *Saier v. State Bar of Michigan,* 293 F.2d 756, 760 (6th Cir.), *cert. den.,* 368 U.S. 947 (1961). Federal courts have no power to issue an injunction or a writ of mandate compelling a state (or a federal) agent to exercise a discretionary power in a given way. *In re Blake,* 175 U.S. 114, 117 (1899); *Work v. Rives,* 267 U.S. 175, 177-78 (1925); *Miquel v. McCarl,* 291 U.S. 442, 452 (1934); *Covington Bridge Co. v. Hager,* 203 U.S. 109, 111 (1906). In particular, they have no power to issue an injunction or writ of mandate compelling a state court to decide to dis-

2. THE DISTRICT COURT'S "INHERENT POWER TO CONTROL" ATTORNEYS ADMITTED TO FEDERAL PRACTICE DOES NOT GIVE IT POWER TO REVIEW A STATE COURT DISBARMENT.

Appellant claims (O. Br. 7, 8) that *Theard v. United States,* 354 U.S. 278 (1957) and *Selling v. Radford,* 243 U.S. 46 (1917) stand for the proposition that a federal court has "inherent powers to protect the capacity and independency of its own officers (Federally Registered Attorneys) from unconstitutional . . . State interference. . . ."*

Actually, *Theard* and *Selling* hold that a federal court is not bound to disbar an attorney from practice before it simply because the court of the state in which the district court sits has disbarred him. They do not hold that a state court disbarment order may be reviewed or reversed in a federal court. In fact, they hold precisely the reverse.

Recognizing that "the authority of the court over its attorneys and counselors is of the highest importance," *Randall v. Brigham,* 7 Wallace 523, 540 (1868), in *Theard* the Court said that state courts "have autonomous control over the conduct of their officers, among whom . . . lawyers are included," *Theard v. United States, supra,* at 281, and in *Selling* it said it had "no authority to re-examine or reverse as a reviewing court the action of the Supreme Court . . . [of a state] in disbarring a member of the bar of the courts of that state for personal and professional misconduct." *Selling v. Radford,* 243 U.S. 46, 50 (1917) (cited at O. Br.

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cipline an attorney in one way rather than another, or to change or reverse a decision as to discipline. See *Ex Parte Garland,* 71 U.S. (4 Wall.) 333, 379 (1866); *Gately v. Sutton,* 310 F.2d 107, 108 (10th Cir. 1962); *Biggs v. Ward,* 212 F.2d 209 (7th Cir. 1954). The power to compel those things, and the function of doing so, is, if anywhere, in reviewing courts, and an action to compel a state court to reverse a decision cannot be used as a substitute for review of a state court judgment. *In re Blake, supra.*

*Appellant also cites *In re Fletcher,* 221 F.2d 477 (4th Cir.), *cert. den.,* 350 U.S. 867 (1955) for the same proposition (O. Br. 8). *Fletcher* held a state court disbarment to be "good cause" for federal court disbarment.

12). Following *Selling,* the Tenth Circuit recently held that federal courts have no "jurisdiction" to entertain a suit brought by a disbarred attorney under the Civil Rights Acts to set aside a state court disbarment order. *Gately v. Sutton,* 310 F.2d 107, 108 (10th Cir. 1962):

> "The federal courts do not have jurisdiction to review an order of the Colorado Court disbarring an attorney in that state for personal and professional misconduct. . . .
>
> "The limits of [federal] review . . . are violations, in the course of disbarment proceedings, of the due process or equal protection clauses of the Fourteenth Amendment, and a petition for a writ of certiorari to the Supreme Court of the United States is the only method by which review may be had." 310 F.2d at 108.*

See also *In re MacNeil,* 266 F.2d 167 (1st Cir. 1959), *cert. den.,* 361 U.S. 861 (1959); *Saier v. State Bar of Michigan,*

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*In rare cases the Supreme Court has reviewed on certiorari a final order of a state supreme court respecting an attorney's right to practice law in the state, but never upon collateral attack. In each of the Supreme Court cases relied upon by appellant, for example, *Konigsberg v. State Bar,* 353 U.S. 252 (1957) (O. Br. 9); *Schware v. Board of Examiners,* 353 U.S. 232 (1957) (O. Br. 9) and *Willner v. Committee on Character and Fitness,* 373 U.S. 96 (1963) (O. Br. 7, 9, 12), the Supreme Court reviewed orders of a state supreme court refusing an attorney's application for admission to practice; each went directly from the state court to the Supreme Court on certiorari. Similarly, in *Holt v. Virginia,* 381 U.S. 131 (1965) (O. Br. 13-14) the Court reviewed an attorney's contempt conviction on certiorari to the State Supreme Court.

The statement that a "legal license" is a "constitutionally protected right" (O. Br. 9) is therefore true in the sense that the Supreme Court will review, on certiorari, state court proceedings concerning the "license." Nevertheless, "the right to practice law in the state court has been held by the Supreme Court not to be a privilege granted by the Federal Constitution," or protected by it, see *Mitchell v. Greenough,* 100 F.2d 184, 185 (9th Cir. 1938), *cert. den.,* 306 U.S. 659 (1939), a holding which indicates the autonomy traditionally accorded State control of attorneys practicing before state courts.

293 F.2d 756, 760 (6th Cir. 1961), *cert. den.,* 368 U.S. 947 (1961).

B. The Complaint Does Not State a Claim Under the Civil Rights Acts, the Statutes Upon Which It Is Based.

The Civil Rights Act under which this action is brought, 42 U.S.C.A. § 1983,* provides that the "person" who does the things it proscribes shall be liable to the people injured by his actions.

A municipality is not a "person" within the meaning of that statute, and therefore no action based upon it will lie against a municipality. *Monroe v. Pape,* 365 U.S. 167, 187-92 (1961); *Egan v. City of Aurora,* 365 U.S. 514 (1961); *Fisher v. New York,* 312 F.2d 890 (2nd Cir. 1963), *cert. den.,* 374 U.S. 828 (1963). The reason is that cities "have been traditionally regarded as subordinate governmental instrumentalities created by the state to assist in the carrying out of state governmental functions," *Reynolds v. Sims,* 377 U.S. 533, 575 (1964); *Mount Pleasant v. Beckwith,* 100 U.S. 514, 529 (1879), and the 1871 Congress, which enacted the Civil Rights Act, decided not to impose obligations upon a "mere instrumentality for the administration of state law." *Monroe v. Pape,* 365 U.S. 167, 190 (1961).† For

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*The complaint is based upon two Civil Rights Acts statutes, 42 U.S.C.A. § 1983 and 28 U.S.C.A. § 1343 (3) (see Tr. 1). Both came from the 1871 Civil Rights Act. Section 1983 imposes liability and § 1343 (3) is its "parallel jurisdictional" provision. See Hart & Wechsler, *The Federal Courts and The Federal System,* p. 829.

†The Congressional Globe indicates that Congress doubted that it had such power. Cong. Globe, 42nd Cong., 1st Sess. 804, 820-21. In view of the Eleventh Amendment, which prohibits federal courts from entertaining suits against a state by citizens of another state, its doubt was well warranted. The Amendment has been construed to prohibit suits (like this one) against a state by citizens of the same state, as well. See *Hans v. Louisiana,* 134 U.S. 1 (1889); *Fitts v. McGhee,* 172 U.S. 516, 524-25 (1899); *North Carolina v. Temple,* 134 U.S. 22 (1889).

the same reason, neither a state or a county, *Sires v. Cole,* 320 F.2d 877 (9th Cir. 1963), or a school district, *Harvey v. Sadler,* 331 F.2d 387 (9th Cir. 1964), or any governmental subdivision of a state, *Hewitt v. City of Jacksonville,* 188 F.2d 423 (5th Cir. 1951), *cert. den.,* 342 U.S. 835 (1951); *Williford v. People of California,* 352 F.2d 474, 476 (9th Cir. 1965) is a person within the meaning of the Civil Rights Acts.

The Washington State Bar is "an agency of the state," Wash. Rev. Code 2.48.010, and is sued as such. (Comp., Tr. 1; O. Br. 1) Its Board of Governors has power, subject to the approval of the State Supreme Court, to fix qualifications for admission to practice, to establish rules of professional conduct, and to hear "causes involving discipline." Wash. Rev. Code § 2.48.060. In hearing those causes, it acts as an agent of the State Supreme Court. *In re Simmons,* 59 W.2d 689, 369 P.2d 947, 954 (1962); *In re Bruen,* 102 Wash. 472, 172 Pac. 1152 (1918). Like most state bars, therefore, it is apparently a "governmental body" in the "judicial department" of State government. 114 A.L.R. 161. See, e.g., Calif. Bus. & Pro. Code, §6008.

As such, and like a municipality, a county or a school district, it is an "instrumentality for the administration of state law." Accordingly, it is not a person within the meaning of the Civil Rights Act, 42 U.S.C.A. § 1983, and cannot be sued under it. Of course, the State itself cannot be sued under it either. See *Williford v. People of California,* 352 F.2d 474, 476 (9th Cir. 1965); *Sires v. Cole, supra.*

C. No Effective Decree Can Be Framed Against Appellees, Because Neither Has the Power to Admit Appellant or to Disbar Him.

Appellant seeks an injunction "vacating the Judgment of disbarment" and "requiring defendants to restore plain-

tiff to the list of active members of the Washington State Bar Association." (Comp., Prayer, Tr. 8) see p. 7, *supra.*

The Washington State Bar had power to and did recommend to the Washington Supreme Court that it disbar appellant, Rev. Code Wash., 2.48.040, but it had no power to and did not disbar him. That power, together with the power to "admit and enroll attorneys in the State of Washington," is exclusively in the Washington Supreme Court. *In re Bruen,* 102 Wash. 472, 172 Pac. 1152, 1153 (1918); *In re Simmons,* 59 W.2d 689, 369 P.2d 947 (1962).

Since the Washington State Bar does not have the power to do the things which appellant asked the District Court to require it to do, and since only the Washington Supreme Court, which is not a party to this action, does have that power, the injunction prayed for cannot be granted and the action must be dismissed. *Williams v. Fanning,* 332 U.S. 490, 493 (1947).

In *Daggs v. Klein,* 169 F.2d 174 (9th Cir. 1948), *cert. den.,* 335 U.S. 908 (1949), for example, the Secretary of the Navy discharged plaintiff civil servants from employment at a naval base. The relevant statute vested authority to discharge, and to restore to employment, in the Secretary. Plaintiffs brought suit against the base commander praying "for an order that they be reinstated to their former employment." *Id.,* at 175-76. This Court affirmed the trial court's order dismissing the action, and said:

> "Applying [the] formula [of *Williams v. Fanning*] to the instant case the query is: Who would be required to act by a decree granting the relief which appellants seek? The answer is found in relating the character of the relief sought to the applicable law. First, appellants ask reinstatement. Question: To whom does the statute delegate the power to reinstate under the circumstances? Answer: To the Secretary.
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> * * *

> ". . . [I]n the absence of the Secretary of the Navy no decree can be entered 'which will grant the relief desired by expending itself on the subordinate official who is before the Court.'" 169 F.2d at 176

Accord, *Sellas v. Kirk,* 200 F.2d 217 (9th Cir. 1952), *cert. den.,* 345 U.S. 940 (1953); *Payne v. Fite,* 184 F.2d 977 (5th Cir. 1950); *Longview Tugboat Co. v. Jameson,* 218 F.2d 547 (9th Cir. 1955).

CONCLUSION

State courts have autonomous control over the discipline of the attorneys who practice before them, and that has been the rule in this country since its beginning. On rare occasions, a state court judgment of disbarment, like other state court judgments, has been reviewed by the Supreme Court of the United States on certiorari. The availability of that means of review represents a careful accommodation between the principles of federalism and the principle that State Courts must have the power to control the conduct of the attorneys who practice before them. Such review was sought by appellant in this case, for he petitioned for certiorari, which was denied. That is the end of the matter, and it should be. District courts are not reviewing courts, and in particular they are not reviewing courts having power to reverse the judgments of state supreme courts imposing discipline upon the attorneys who practice before them. No court has ever held that they are. The District Court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MORRIS M. DOYLE